

HON. JAMAL N. WHITEHEAD

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VALVE CORPORATION,

Plaintiff,

v.

LEIGH ROTHSCHILD, ROTHSCHILD
BROADCAST DISTRIBUTION SYSTEMS,
LLC, DISPLAY TECHNOLOGIES, LLC,
PATENT ASSET MANAGEMENT, LLC,
MEYLER LEGAL, PLLC, AND SAMUEL
MEYLER,

Defendants.

Case No. 2:23-cv-1016

**AGREEMENT REGARDING
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION AND
ORDER**

**NOTE ON MOTION CALENDAR:
April 22, 2024**

Complaint Filed: 07/07/2023

JURY TRIAL DEMANDED

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information ("ESI") in this matter:

A. General Principles

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related

1 responses should be reasonably targeted, clear, and as specific as possible. This agreement is
 2 intended to assist the parties in identifying relevant, responsive information that has been stored
 3 electronically and is proportional to the needs of the case. The agreement does not supplant the
 4 parties' obligations to comply with Fed. R. Civ. P. 34.

5 **B. ESI Disclosures**

6 Within 10 business days of entry of this Order, each party shall disclose:

7 1. Custodians. The 5 custodians most likely to have discoverable ESI in their
 8 possession, custody, or control. The custodians shall be identified by name, title, connection to the
 9 instant litigation, and the type of the information under the custodian's control. If a party does not
 10 have 5 custodians it reasonably believes have discoverable ESI in their possession, custody, or
 11 control, it so shall state and provide justification.

12 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g., shared
 13 drives, servers, enterprise systems), if any, likely to contain discoverable ESI.

14 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain
 15 discoverable ESI (e.g., third-party email providers, mobile device providers, mobile or other third
 16 party applications, cloud storage) and, for each such source, the extent to which a party is (or is
 17 not) able to preserve information stored in the third-party data source.

18 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
 19 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
 20 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

21 **C. ESI Discovery Procedures**

22 1. On-site inspection of electronic media. Such an inspection shall not be required
 23 absent a demonstration by the requesting party of specific need and good cause or by agreement of
 24 the parties.

25 2. Search methodology. The parties agree to use search terms for custodial data
 26 sources (including email). If the producing party elects to use search terms to locate potentially
 27 responsive ESI for non-custodial data sources, the following provisions shall apply as well. The
 28 parties shall timely confer to attempt to reach agreement on appropriate search terms and queries,

1 file type and date restrictions, data sources (including custodians), and other appropriate computer-
2 or technology-aided methodologies, before any such effort is undertaken. The parties shall
3 continue to cooperate in revising the appropriateness of the search methodology.

4 a. Prior to running searches:

5 i. Within 14 days of this order or within 14 days of receiving
6 discovery requests, whichever is later, the producing party shall disclose the data sources
7 (including custodians), search terms and queries, any file type and date restrictions, and any other
8 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable
9 information. The producing party may provide unique hit counts for each search query.

10 ii. The following provisions apply to search terms / queries of the
11 requesting party. Focused terms and queries should be employed; broad terms or queries, such as
12 product and company names, generally should be avoided. Within 10 business days of receiving
13 the proposed search terms or queries from the requesting party, the producing party shall perform
14 the test searches for the proposed search terms or queries and inform the requesting party whether
15 it objects to any of the proposed terms or queries based, at least in part, on the results of the test
16 searches. The parties shall then meet and confer within five business days and if the disagreement
17 cannot be resolved, they shall submit their dispute to the Court in accordance with the Court's
18 discovery dispute procedure. Without waiting for a ruling on the disputed search terms or queries,
19 the producing party shall search using the non-objected to search terms or queries, if any.

20 b. The requesting party is entitled to add no more than 10 search terms or
21 queries to those disclosed by the producing party absent a showing of good cause or agreement of
22 the parties.

23 3. Format.

24 a. ESI will be produced to the requesting party with searchable text, in a
25 format to be decided between the parties. Acceptable formats include, but are not limited to, native
26 files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only
27 with load files for e-discovery software that includes metadata fields identifying natural document
28 breaks and also includes companion OCR and/or extracted text files), and searchable PDF.

1 b. Unless otherwise agreed to by the parties, files that are not easily converted
2 to image format, such as spreadsheet, database, and drawing files, will be produced in native
3 format.

4 c. Each document image file shall be named with a unique number (Bates
5 Number). File names should not be more than twenty characters long or contain spaces. When a
6 text-searchable image file is produced, the producing party must preserve the integrity of the
7 underlying ESI, i.e., the original formatting, the metadata (as noted below) and, where applicable,
8 the revision history.

9 d. If a document is more than one page, the unitization of the document and
10 any attachments and/or affixed notes shall be maintained as they existed in the original document.

11 e. The parties shall produce their information in the following format: single-
12 page images and associated multi-page text files containing extracted text or with appropriate
13 software load files containing all information required by the litigation support system used by the
14 receiving party.

15 f. The full text of each electronic document shall be extracted (“Extracted
16 Text”) and produced in a text file. The Extracted Text shall be provided in searchable ASCII text
17 format (or Unicode text format if the text is in a foreign language) and shall be named with a
18 unique Bates Number (e.g., the unique Bates Number of the first page of the corresponding
19 production version of the document followed by its file extension).

20 4. De-duplication. The parties may de-duplicate their ESI production across custodial
21 and non-custodial data sources after disclosure to the requesting party, and the duplicate custodian
22 information removed during the de-duplication process tracked in a duplicate/other custodian field
23 in the database load file.

24 5. Email Threading. The parties may use analytics technology to identify email
25 threads and need only produce the unique most inclusive copy and related family members and
26 may exclude lesser inclusive copies. The parties must produce all related family members and
27 lesser inclusive copies if they include attachments or other unique information. Upon reasonable
28 request, the producing party will produce a less inclusive copy.

6. Metadata fields. The parties agree that only the following metadata fields need be produced, and only to the extent it is reasonably accessible and non-privileged: document type; custodian and duplicate custodians (or storage location if no custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size; file extension; original file path; date and time created, sent, modified and/or received; and hash value. The list of metadata type is intended to be flexible and may be changed by agreement of the parties, particularly in light of advances and changes in technology, vendor, and business practices.

7. Hard-Copy Documents. If the parties elect to produce hard-copy documents in an electronic format, the production of hard-copy documents will include a cross-reference file that indicates document breaks and sets forth the custodian or custodian/location associated with each produced document. Hard-copy documents will be scanned using Optical Character Recognition technology and searchable ASCII text files will be produced (or Unicode text format if the text is in a foreign language), unless the producing party can show that the cost would outweigh the usefulness of scanning (for example, when the condition of the paper is not conducive to scanning and will not result in accurate or reasonably useable/searchable ESI). Each file will be named with a unique Bates Number (e.g., the unique Bates Number of the first page of the corresponding production version of the document followed by its file extension).

D. Preservation of ESI

The parties acknowledge that they have a common law obligation, as expressed in Fed. R. Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody, or control. With respect to preservation of ESI, the parties agree as follows:

1. Absent a showing of good cause by the requesting party, the parties shall not be required to modify the procedures used by them in the ordinary course of business to back-up and archive data; provided, however, that the parties shall preserve all discoverable ESI in their possession, custody, or control.

2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P. 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure

1 where that data is created after a disclosure or response is made (unless excluded under Sections
2 (D)(3) or (E)(1)-(2)).

3 3. Absent a showing of good cause by the requesting party, the following categories
4 of ESI need not be preserved:

- 5 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 6 b. Random access memory (RAM), temporary files, or other ephemeral data
7 that are difficult to preserve without disabling the operating system.
- 8 c. On-line access data such as temporary internet files, history, cache, cookies,
9 and the like.
- 10 d. Data in metadata fields that are frequently updated automatically, such as
11 last-opened dates (see also Section (E)(5)).
- 12 e. Back-up data that are duplicative of data that are more accessible elsewhere.
- 13 f. Server, system or network logs.
- 14 g. Data remaining from systems no longer in use that is unintelligible on the
15 systems in use.
- 16 h. Electronic data (e.g., email, calendars, contact data, and notes) sent to or
17 from mobile devices (e.g., iPhone, iPad, Android devices), provided that a copy of all such
18 electronic data is automatically saved in real time elsewhere (such as on a server, laptop, desktop
19 computer, or “cloud” storage).

20 **E. Privilege**

21 1. A producing party shall create a privilege log of all documents fully withheld from
22 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this
23 Agreement and Order. Privilege logs shall include a unique identification number for each
24 document, a general description of the document, and the basis for the claim (attorney-client
25 privileged or work-product protection). For ESI, the privilege log may be generated using
26 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title;
27 and date created. Should the available metadata provide insufficient information for the purpose of
28 evaluating the privilege claim asserted, the producing party shall include such additional

1 information as required by the Federal Rules of Civil Procedure. Privilege logs will be produced to
2 all other parties no later than 30 days after delivering a production unless a later deadline is agreed
3 to by the parties.

4 2. Redactions need not be logged so long as the basis for the redaction is clear on the
5 redacted document.

6 3. With respect to privileged or work-product information generated after the filing of
7 the complaint, parties are not required to include any such information in privilege logs except
8 upon a showing of good cause or upon agreement of the parties.

9 4. Activities undertaken in compliance with the duty to preserve information are
10 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

11 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents, electronically
12 stored information (ESI) or information, whether inadvertent or otherwise, in this proceeding shall
13 not, for the purposes of this proceeding or any other federal or state proceeding, constitute a
14 waiver by the producing party of any privilege applicable to those documents, including the
15 attorney-client privilege, attorney work-product protection, or any other privilege or protection
16 recognized by law. This Order shall be interpreted to provide the maximum protection allowed by
17 Fed. R. Evid. 502(d). The provisions of Fed. R. Evid. 502(b) do not apply. Nothing contained
18 herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI
19 or information (including metadata) for relevance, responsiveness and/or segregation of privileged
20 and/or protected information before production. Information produced in discovery that is
21 protected as privileged or work product shall be immediately returned to the producing party.

1 DATED: April 22, 2024

Respectfully submitted,

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11 DATED: April 22, 2024

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24 Dated this 17th day of June, 2024.

25 

26 HON. JAMAL N. WHITEHEAD

27 UNITED STATES DISTRICT JUDGE